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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 670

TEXAS AND NEW ORLEANS RAILROAD COMPANY ET AL.,
Appellants

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially-constituted District Court (R. 899) is not yet reported.

The report of the Interstate Commerce Commission (R. 63) in *Western Horse and Mule Rates*, No. 12358, *Texas Livestock Shippers Protective League et al.* v. *Director General et al.*, (pursuant to which were issued the orders of the Commission herein attacked) is published at 195 I. C. C. 417.

QUESTIONS

The ultimate question presented is the validity of two orders of the Interstate Commerce Commission (hereinafter called the Commission). The first order (R. 103) requires appellants to establish and maintain a prescribed scale of rates for the transportation of horses and mules, in carloads, in southwestern territory. The second order (R. 117) is a denial by the Commission of the appellants' applications for permission to violate the provisions of Section 4 of the Interstate Commerce Act with respect to horse and mule rates found by the Commision to be unreasonable and superseded by the rates prescribed.

Subordinate questions are: (1) Whether the evidence before the Commission and the findings made by it are sufficient to support the orders; (2) whether the Commission refused properly to consider certain evidence offered by the appellants; (3) whether the Commission acted arbitrarily in denying appellants' applications for authority to maintain, in violation of Section 4 of the Act, certain of the rates found by the Commission to be unreasonable; (4) whether the order prescribing new rates was rendered void because of the Commission's failure to grant, contemporaneously therewith and upon its own initiative, relief from Section 4 with respect to the prescribed rates; and whether this question is rendered moot by the Commission's subsequent grant of said fourth section

relief upon appellants' own applications; and (5) whether appellants were denied an adequate hearing because of the Commission's denial of their petition for further hearing upon alleged "changed conditions."

STATUTES

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pages 59–63.

STATEMENT

This is a direct appeal by the southwestern carriers from the final decree (R. 124) of the District Court for the Western District of Missouri, sitting as a specially-constituted three-judge court, sustaining the validity of the Commission's order entered December 11, 1933, (R. 105) in *Western Horse and Mule Rates,* 195 I. C. C. 417 (R. 63), and dismissing the bill of complaint. The order required the carriers to establish as maximum reasonable rates on horses, mules, burros and asses (hereinafter designated as "horses and mules") between points in southwestern territory rates not in excess of 115 percent of the rates on fat cattle which the Commission had previously prescribed in *Livestock—Western District Rates,* 176 I. C. C. 1, 188.

Proceedings before the Commission

By orders dated June 12, 1925, March 16, 1925, January 4, 1926, and February 6, 1926, the Commission reopened and consolidated for further

hearing (restricted to rates and minimum weights for the future only) Docket No. 12358, *Texas Livestock Shippers Protective League* v. *Director General*, and a number of other pending proceedings (listed and described in the Commission's report, 195 I. C. C. 417; R. 63), which collectively involved freight rates on non-edible livestock throughout western and southwestern territory. In these proceedings the Commission had prescribed several scales of rates upon the commodities in question for application in various territories.

After extensive hearings the consolidated record was again reopened for further hearing "in all respects" by the Commission's order of February 1, 1932, it being stated in the formal notice of such reopening that the primary purpose thereof was to afford parties the opportunity of showing on the record "the changed conditions in the field of railroad operations and the horse and mule industry in so far as those conditions may affect the rates to be here prescribed."[1] (R. 772.)

Further hearings were had, and on July 24, 1933, the Commission issued its report (195 I. C. C. 417; R. 63) wherein it found that its previous orders prescribing rates on horses and mules should be set aside and then "that maximum reasonable rates for the transportation of horses, mules, burros,

[1] This action of the Commission unquestionably arose from its desire to comply with the requirements specified by this Court in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248.

and asses between points in the territory described at the beginning of this report will be 115 percent of the rates on cattle from and to the same points, prescribed in *Livestock—Western District Rates*, subject to a minimum of 23,000 pounds; that rates in excess thereof are, and for the future will be, unreasonable, and our findings in *Horse and Mule Rates in the Southwest, 1924, Rates on Horses and Mules in the Southwest, Nebraska Livestock Case*, and *South Dakota Case* are modified accordingly." (R. 95.)

As to the establishment of rates in conformity with its findings, the Commission said (R. 95): "No orders requiring the establishment of rates in conformity with the revised findings will now be entered, but defendants will be expected to establish such rates within 90 days after the service of this report. In case this is not done, we will consider the entry of appropriate orders."

Expecting compliance with its findings, the Commission, by an order of even date with its aforesaid report (R. 117) denied certain pending applications by the carriers for authority to continue the fourth section violations under the previously existing rates in accordance with temporary permission already granted. Regarding this action, the Commission in its report said (R. 95):

> Fourth-section relief may be necessary in order that rates in conformity with the findings herein may be established. Accordingly, defendants may file applications for

> such relief as they may require in connection with the rates here prescribed. The above-numbered applications will be denied and the outstanding fourth-section orders will be vacated six months after the service of this report. In instances in which applications are filed within 90 days after service of this report, consideration will be given to the entry of an order granting temporary relief to aid the establishment of the rates in conformity with the findings herein made and to maintain such rates until final action upon such applications.[2]

Instead of establishing the scale of rates suggested, appellants, on November 8, 1933 (R. 1045) filed with the Commission their petition for reconsideration of the findings and conclusions expressed in its report. In support of their petition the carriers repeated the points they had previously urged upon the Commission in the latter hearings in the consolidated case and further alleged that certain material changes of condition had occurred since the completion of the testimony.

Appellants pointed out available sources of information as to the alleged changes relied upon, and asked that the case be reopened for further

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[2] The "above-numbered applications" referred to were for authority to continue rates on horses and mules in western territory without observing the long-and-short haul provision of Section 4 of the Interstate Commerce Act. The validity of the order denying these applications and vacating the "outstanding fourth section orders" is attacked in this suit.

evidence *if the Commission "did not feel at liberty" to resort to such sources.*

The changes enumerated by appellants were: (1) Increased demand for and value of horses and mules; (2) the amendment of paragraph (2) of Section 15a of Transportation Act, 1920, by Section 205 of the Emergency Transportation Act, 1933, as applied to the depressed financial condition of the southwestern carriers, and (3) the "free and easy movement" of horse and mule traffic. (R. 1047–48.) The remainder of the petition is in the nature of a motion for a new trial based upon alleged errors of the Commission in its weighing of, and its administrative action upon, the evidence already before it. The petition was accompanied by a 25-page "Brief of Argument." (R. 1055.) Interested shippers filed an answer to the carriers' petition setting out, among other things, that the case had already been reopened and the hearing conducted for proof of changed conditions and that conditions had not materially changed since the hearing. It was also pointed out that all other questions raised in the petition had already been fully presented to and decided by the Commission. (R. 1081.) Appellants then submitted a "Motion to Delete," in which they alleged that certain statements in the shippers' answer were incorrect. (R. 1083.) The Commission denied appellants' application for reconsideration, etc., by order dated December 11, 1933 (R. 101), and on the same day

entered its order requiring compliance with the findings expressed in its report of July 24, 1933.

The effective date of the last named order was postponed from time to time during the pendency of the case in the District Court, as was the order of July 24, 1933 (R. 117), denying fourth section relief as to the prior rates. The carriers, in compliance with the Commission's suggestion relative to fourth section relief, (R. 95) made their applications (R. 1117–1124) for such relief as they desired, and by order of February 3, 1934, the Commission granted said applications. (R. 1090.)

Proceedings in the lower court

By their Amended Bill of Complaint (R. 7), the appellants sought to set aside the Commission's aforesaid order of December 11, 1933 (R. 103–110), insofar as it affected southwestern territory, asserting its illegality upon grounds that the order fixing the horse and mule rates at 115 percent of fat cattle rates was contrary to law and not supported by the evidence in the case, nor by the findings of the report. When examined the allegations as to errors and omissions by the Commission will be found, in effect, to amount merely to criticism of the conclusions drawn by the Commission from the evidence. It should be noted that the appellants do not contend that the rates prescribed are non-compensatory or that confiscation would result.

The United States and the Commission filed their separate answers (R. 119–124), wherein they ad-

mitted the allegations of the amended complaint with respect to the history of the proceedings before the Commission, and the correctness of copies of reports and orders attached as exhibits to the amended complaint. (R. 63–118) The answers denied the allegations of the complaint as to the invalidity of the order in question and prayed that the suit be dismissed.

The evidence introduced before the three-judge court (composed of VanValkenburgh, Circuit Judge, and Reeves and Otis, District Judges) at the hearing in Kansas City, March 24, 1934 (R. 171), consisted chiefly of transcripts of all the testimony and exhibits submitted to the Commission in the numerous hearings in the several proceedings which were consolidated for the further hearing, and resulted in the final orders attacked (R. 184–895; 1131–1213.)

In addition to this appellants introduced certain other evidence to which the defendants objected on the ground that it was either irrelevant, incompetent or otherwise inadmissible. We do not deem it necessary here to enumerate all the items of such inadmissible evidence, but included therein were two proposed reports submitted by Commission examiners, Exhibits SS and VV (R. 947–1038); transcript of a portion of the testimony given by a witness in another Commission proceeding, Exhibit AL (R. 889–893), and a Commission report and order in another proceeding made subsequent

to that involved in the case at bar, Exhibit AQ (not printed). The Commission put in evidence certified copies of applications of appellants for fourth section relief in connection with new rates here in controversy, upon which fourth section orders already put in evidence by appellants had been based. (R. 1117–1124; R. 1090.)

On June 7, 1934, the court handed down its opinion, and in accordance therewith entered its final decree dismissing the bill of complaint for want of equity. (R. 124.) The court's opinion (R. 899) describes the order which prescribed the Southwestern Horse and Mule scale as the "most important" of the two orders attacked. Concerning this order the court said (R. 899–900):

> * * * This order was based upon a finding that the transportation of horses and mules was so far analogous to the transportation of fat-cattle as to justify the Commission in relating the tariffs thereto and fixing a scale of 115 percent of the fat-cattle tariffs. Moreover, the Commission withdrew from the carriers certain relief previously granted under the Fourth Section of the Interstate Commerce Act. Said Section permitted the Interstate Commerce Commission to authorize a common carrier, upon application and after investigation in special cases to charge more for a shorter than for a longer haul, notwithstanding statutory inhibitions.

After quoting pertinent portions of the Commission's report showing the substance of the evidence before it, the court said (R. 902):

> It is obvious from the report of the Commission, and from the statements and briefs of the parties, that there was substantial evidence in support of the order of the Commission fixing the rate for the transportation of horses and mules at 115 percent of the rate or schedule of rates on fat-cattle.

The language of this court in *Florida* v. *United States*, 292 U. S. 1, 12, is quoted as follows (R. 902):

> When the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission.

Referring to the fact that rates on other varieties of livestock than horses and mules were based upon prescribed relationships to cattle, the court said (R. 902–903):

> It is difficult to perceive how the Commission could have related the scale of tariffs pertaining to horses and mules to any other property more logically than that of fat-cattle. According to the report of the Commission, other livestock shipments were related in the same fashion.

Pointing out (R. 903) that the Commission's invitation to the carriers to apply for fourth section relief would negative the charge that its actions in that regard were arbitrary or capricious, the court held that there was nothing in the record to indicate that the Commission's actions in the case were "preconceived and premeditated" as charged by appellants. As to appellants' objections to the legality of the order prescribing the rates, the court said (R. 903–904):

> It does not seem necessary to discuss other constitutional questions raised by the pleadings and briefs of the parties. It was clearly the right of the Commission "to compare the rates assailed with other rates which in its judgment formed a proper basis of comparison." Northern Pacific Ry. Co. v. United States, 60 Fed. (2d) 302; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, l. c. 98.
>
> Moreover, it is not within the province of the court either to consider the weight of the evidence before the Commission or "the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases." *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, l. c. 663.

In compliance with this Court's rules of practice, the court made its concise findings, as follows (R. 904):

Findings of Fact

The court finds that the Interstate Commerce Commission made the order complained against in plaintiff's bill after full, adequate, and complete investigation of all the facts; and that such orders were not arbitrary, capricious, nor unreasonable, but, on the contrary, such orders were made with due deference and regard to the law, and that same were supported by the evidence.

Conclusions of Law

The court, therefore, concludes that the plaintiffs are not entitled to the relief prayed, and that application for a final injunction should be denied.

Appellants requested the court to make elaborate findings of fact and conclusions of law (R. 125), all of which the court refused. The court on July 10, 1934, denied appellants' petition for a stay order pending appeal (R. 167), and appellants duly perfected their appeal to this Court.

Appellants' bill of complaint assigned seventeen "Grounds for Relief" against the orders attacked. (R. 30–53) The statutory court's inability to agree with appellants as to the sufficiency of any of these grounds resulted in their filing no less than sixty assignments of error. (R. 151–162.) In this Court appellants rely on fifteen "Points" (R. 1124–1130), each of which is treated in a separate division of appellants' "Brief of Argument",

which covers 147 printed pages and contains no "Synopsis of Argument."

We believe this large number of "grounds," "errors" and "points" to be unnecessarily diffuse, and shall endeavor in our argument to classify and refute appellants' contentions under a much simpler arrangement.

SUMMARY OF ARGUMENT

I. The orders attacked in this suit were made after a full hearing and careful consideration by the Commission of a great volume of evidence. The Commission considered numerous other rates approved or prescribed by it, wherein horse and mule rates were made upon a fixed relationship to rates on other species of livestock. The condition of the livestock industry as a whole was considered with the variations and trends of prices. The revenues and the financial condition of carriers were before the Commission and were discussed in the report. There was much evidence upon the manner of handling the various kinds of stock in traffic, and of the traffic disadvantages and difficulties appertaining thereto. From all of this evidence which is summarized and discussed in the report, the Commission found that horses and mules should take a rate 15 percent higher than rates previously prescribed for cattle throughout the western district.

The Commission's orders having been made after full hearing in which appellants participated, upon substantial evidence, and with an exhaustive report containing all findings and conclusions required by the statute, the action of the District Court in dismissing the bill of complaint should be affirmed.

II. Point II of appellants' argument, that the Commission had failed to accord proper weight and significance to certain evidence is not well taken.

The courts will not weigh the evidence upon which the Commission has made its order, and if there was substantial evidence before the Commission, and its order is not otherwise unlawful, the courts will not set it aside. The courts will not require the Commission to draw a particular conclusion from certain evidence, since that would necessitate a weighing thereof by the court.

III. The Commission's order is not illegal because it prescribed horse and mule rates by reference to the cattle rates previously fixed. There is nothing inherently wrong in the fixing of rates on one commodity by relating them to rates already established on other similar commodities. The appellants have no ground for their contention that the cattle rates established in *Livestock-Western District Rates*, 176 I. C. C. 1, could not be used as a basis for the horse and mule rates.

1. The edible livestock rates were not based chiefly upon the condition of the livestock industry

as is asserted by appellants; that was only one of many factors considered by the Commission as is shown by its report. The report also shows that much weight was given to the prevailing traffic conditions. Although the revenue derived from the edible livestock traffic is many times that derived from the horse and mule traffic, no action was taken to set aside the Commission's order and the rates prescribed for edible livestock are now in effect. It might have been argued to the Commission that the cattle rates were too low to be used as the basis for rates on other commodities, but the Courts will not consider such argument.

2. Differences in traffic conditions incident to the respective commodities do not as a matter of law prevent the Commission from relating the horse rates to the cattle rates. The question is an administrative one to be determined by the Commission. The Commission has recognized the existence of transportation differences and reflected them in the horse rates. The real complaint of appellants is that 15 percent does not fully represent in money the transportation difficulties in connection with horses and mules as compared with cattle. This is an administrative question for the Commission.

3. The fact that the Commission had previously in other cases prescribed horse and mule rates without relating them to cattle rates, constitutes no legal bar to its doing so in the report and order involved in this case. The validity of the order is not de-

pendent upon its consistency with previous actions. A rate order is not *res adjudicata*.

4. The Commission is not required by law to make findings reconciling, explaining or justifying rulings which are inconsistent with rulings previously made. Section 14 (l) of the Interstate Commerce Act imposes no such duty. To make such findings would seriously interfere with the effective performance of the Commission's functions. The reasonableness of rates cannot be proved by categorical answers nor figured out as a mathematical problem; therefore, the findings necessary to support the order in question are that the old rates were unreasonable and that those prescribed for the future would be reasonable. The report contains, and the evidence justifies, both findings.

The cases cited by appellants upon the subject of necessary findings are not applicable to the instant case.

IV. Appellants' contentions embodied in its Points VIII to XI, inclusive, that the Commission's order is invalid because it fails to fix for southwestern territory higher rates than those prevailing in other parts of the country are not sound.

The matter of rate differentials is peculiarly for the Commission's determination. Appellants could have no vested right to charge a higher rate in southwestern territory than is charged elsewhere. All the reasons which appellants here give to support their claim that they should have higher

rates in southwestern territory than are charged in certain other areas were presented and forcibly argued to the Commission. After exhaustive investigation in which the appellants participated, the Commission decided that uniform scales of rates upon livestock of the various kinds should prevail throughout western district territory and that administrative determination should not be interfered with by the courts.

V. 1. The appellants in Point XII of their brief contend that the Commission endeavored to coerce the carriers to establish the rates prescribed in its report of July 24, 1933, without a formal order, by ordering the vacation, as of February 5, 1934 (nearly six months thereafter), of certain fourth section relief previously granted in connection with the previous rates. The charge has no relevancy to the issues before the Court, since the Commission subsequently issued its order. The Commission's action, however, does not deserve the sinister motive attributed to it by appellants. If the carriers had voluntarily established the prescribed rates within 90 days as suggested in the report, the fourth section relief would not have been needed any longer. But as indicating that the Commission had no purpose of coercion, we point out that by voluntary postponement of the cancellation order the Commission maintained the fourth section relief as long as the old rates remained in effect during the progress of this suit in the lower court.

2. Appellants further erroneously claim (Point XV of their brief) that the Commission's order is invalid because it was not accompanied by an order granting fourth section relief. The Commission in its report intimated that such relief might be needed in connection with the new rates, and suggested that carriers apply for such relief as they desired. Such applications were subsequently made and granted in full.

(a) In making general rate orders it has been the practice of the Commission to suggest to railroads that they make specific application for such special permission, consideration or treatment as they desire, and the court has held that such practice is not contrary to law.

(b) The Commission's order applies only to rates for transportation over routes voluntarily established by carriers; it does not deal with the establishment of any through route, which the Commission is given power to require under Section 15 (3) of the Interstate Commerce Act. Therefore, appellants' contention that the Commission's order will compel them to "short-haul" themselves (against which they are protected by Section 15 (4)) cannot be sustained.

(c) But the question is moot, since the carriers have in fact applied to the Commission for fourth section relief in connection with the new rates and the same has been granted. They are not deprived of any right, and this Court cannot restore to them something they already have.

VI. The Commission's refusal to reopen the proceedings before it in November, 1933, for further evidence of alleged changed conditions was not arbitrary or unreasonable, as charged by appellants in Point XIII of their brief. Appellants' petition prayed a reopening for further evidence only in the event that the Commission required further evidence in order to act upon the petition. The appellants alleged changed conditions in the horse and mule business and in railroad finances.

None of the alleged facts called to the Commission's attention by appellants' petition, even if fully proven, would have imposed upon the Commission a legal obligation to reconsider, reopen or rehear the case. A ten percent increase in the market prices of the commodity, and a slight increase in the demand, are clearly not such changes in rate-making factors as would compel a change in the rate scale.

The financial difficulties of the railroads had been forcibly brought to the attention of the Commission a short time previously in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248, and the case had been reopened by the Commission for evidence of new conditions. Obviously the Commission was cognizant of any changes that had occurred in the appellants' finances. The record shows that the volume of horse and mule traffic is only three or four percent of that of the total livestock traffic, and hence is of too small a proportionate volume

to affect materially the railroads' revenues. Conversely the amount is too small for the rate level to require change, because of minor changes in the carriers' financial status.

VII. If calmly and reasonably viewed, the acts of the Commission, in which counsel in Point XV of appellants' brief see a deep-laid plot to wrong the southwestern roads, appear in reality as normal and proper acts of the Commission in the performance of its official duties. Appellants' suspicions are unjustified and they state in their brief nothing to indicate that they were not given a fair and unprejudiced hearing by the Commission.

ARGUMENT

I

The orders which appellants seek to have the court set aside were made after a full hearing in the lawful exercise of the Commission's administrative powers and were fully supported by the evidence and the findings

The orders attacked in this suit were made after a careful consideration by the Commission of thousands of pages of testimony and hundreds of exhibits offered by producers, shippers, and dealers in horses and mules in the western district of this country, and the carriers by railroad covering every phase of the nonedible livestock business, and of the conditions affecting the carriers. The volume and scope of the data before the Commission are indicated by the report (R. 63; 195 I. C. C. 417),

the testimony abstracted (R. 596 to 892) and the exhibits (listed R. 1134 to 1213).

The report refers to prior cases involving horse and mule rates (R. 64), including the *Nebraska Livestock Case,* 89 I. C. C. 444, wherein the Nebraska Commission had suggested a horse and mule scale of 115 percent of the contemporary cattle scale; the *South Dakota Case,* 77 I. C. C. 451, wherein the Commission prescribed for horses and mules (and for hogs and calves) a scale 115 percent of cattle rates for like distances (R. 65); the *Dimmitt-Caudle-Smith Case,* 47 I. C. C. 287, wherein the Commission prescribed 120 percent of beef cattle rates for horses and mules (R. 67), and the *Galesburg Case,* 152 I. C. C. 165 (R. 68).

It is pointed out that in the western district "no less than six different rate bases apply," and that rates on horses to important midcontinental markets have been established mainly with relation to contemporaneous cattle rates. (R. 67.) The flow of the traffic (R. 68), the volume, production and values of the product are shown. (R. 68–69.) It is pointed out that the movement of horses and mules is not more than three or four percent of the volume of the movement of edible livestock. (R. 69.) The number of horses and mules displaced by tractors and trucks on farms was referred to (R. 70), as was the "marked decline in the farm prices" upon the animals, and receipts at ten principal markets showed a marked decline

just prior to 1931, as compared with pre-war years. (R. 70–71.) Stockyard prices were shown to vary widely among the different grades. The value per head of horses is compared with those of cattle. (R. 71.) The expenditures by the railways for loss and damage claims is discussed, and it appeared that the loss and damage on horses is proportionately higher than on other livestock. (R. 72.) Discussing the positions taken by the parties before it, the Commission pointed out that Texas complainants contended that the conditions justifying differentials (higher rates to and from certain portions of the state) no longer prevailed and that the same scale should apply throughout the state. The Chambers of Commerce of Kansas City and St. Joseph, Mo., urged that the horse and mule rates should be based upon and related to the cattle scale prescribed in the *Western District Livestock Case*, 176 I. C. C. 1. (R. 74.) The Wichita Chamber of Commerce suggested 115 percent of the cattle scale. The Nebraska State Railroad Commission and that of South Dakota advocated horse and mule rates of 110 percent of fat cattle rates. The railroads proposed class A rates, (R. 75) and supported the proposal with numerous exhibits. These exhibits are analyzed in detail with a consideration of revenues and return on book investment. (R. 85–88.) The various scales (proposed and in effect) are compared. After an elaborate marshalling of the facts shown in the evidence

(R. 64–90), the Commission (R. 90–95) states its conclusions, at the beginning of which it says:

> In this consolidated proceeding we are called upon to determine the scale or scales of rates proper for application on horses and mules from and to points in the territories covered by these several cases. (See footnote to R. 63.)

The Commission (R. 91) considered first the question as to whether a uniform scale should be applied throughout all the western district territory. Stating that the evidence upon which the southwestern carriers based their contention that operating conditions in a portion of Texas and New Mexico justified higher rates, was "comprehensive and detailed", the Commission cited its ruling in *Livestock-Western District rates* (*supra*) and concluded "that the scale of rates hereinafter fixed should apply uniformly throughout the territory covered by these consolidated cases." (R. 91.)

Whether the horse and mule rates should bear a fixed relation to the rates on edible livestock is characterized as a "fundamental question" and it is pointed out that the shippers and shipping organizations represented at the hearing were unanimously of the opinion that the horse and mule rates should be so related to the cattle rates.

In the consideration of what this "fixed relation" to cattle rates should be, the Commission compared the production and transportation of livestock of various kinds, pointing to the similari-

ties and differences between the handling of the various species. The conclusion was that the rates on horses and mules should be related to corresponding rates on fat cattle. As to the reasons for establishing a fixed relationship and what that relationship should be, the Commission said (R. 91–93):

> Various unusual expenses are incurred in the transportation of livestock. Among these are the costs of construction and maintenance of loading and unloading enclosures and runways. Special tracks have to be constructed to these yards, and facilities afforded for feeding, watering, and resting livestock in transit under the requirements of the Federal 28-hour law. Additional expenses are incurred in unloading and reloading livestock at public stockyards, and to comply with the State and Federal quarantine regulations. Yards must be maintained for cleaning stock cars, and removing old bedding and rebedding the cars. The expense of moving stock cars from the Kansas City yards to the yards at Morris, Kans., and return is placed at 53 cents per car, while the average cost of cleaning the cars is stated to be $1.105 per car. The cost of bedding which averages about 3 tons per car, is placed by the carriers at 2.5 to 8 times the amount of the tariff charge for this service. In addition, free transportation is afforded to caretakers, and additional risks and liabilities incurred in their transportation. Animals are moved under expedited service.

In the course of transportation they require constant attention, and must be carefully handled to prevent injuries. The percentage of empty to loaded car movement, amounting to 83.12 percent as shown by a traffic study conducted on 35 western railroads during the month of October 1926, increases greatly the operating costs.

None of these expenses are peculiar to the transportation of horses and mules. They are incurred in the transportation of all livestock. Such evidence does not justify the singling out of horses and mules as the exception to the general application on all kinds of ordinary livestock of rates related to the fat-cattle rates. The only substantial transportation disadvantages of horses and mules as compared with other forms of ordinary livestock are a higher percentage of claims for loss and damage and a higher per car valuation. The shippers concede that horses and mules are more subject to injury than cattle, but they will be satisfied with a higher level of rates than may apply on cattle. The car revenue on horses and mules averages higher than on cattle because of higher rates and minimum weights. These factors, the shippers contend, outweigh the adverse factor of higher loss and damage claims.

Horses and mules are produced on the farms and ranges of the West under substantially the same conditions as cattle, and they are transported in the same manner. It is illogical to prescribe rates on this traffic

unrelated to the rates on cattle, when the rates on hogs, sheep, and all other ordinary forms of livestock are based on the fat-cattle rates. The assertion that cattle, hogs, and sheep are subjected to severer competitive conditions than horses and mules has not been established. It is true that a low level of rates on cattle is necessary to move those animals to the primary markets, and that competitive conditions have affected those rates. But the cities which are primary markets for cattle, sheep, and hogs are also the primary markets for horses and mules. The competitive conditions which affect the rates on cattle consigned to those markets likewise must be considered in prescribing the rates on horses and mules. We conclude therefore, that the rates on horses and mules here in issue should be related to the corresponding rates on fat cattle.

In *Livestock—Western District Rates,* we prescribed 115 percent of the fat-cattle scale for application on calves and hogs, in single-deck cars, and 125 percent of that scale on sheep and goats, in single-deck cars. The 115 percent scale is lower than the southwestern horse and mule scale, the differences amounting to a reduction of 13.4 percent in the rates at 500 miles and to 8.3 percent in the rates at 1,000 miles. Compared with the prescribed eastern South Dakota single-line scale, it would result in increases commencing at 300 miles, which amount to 9 percent in the rate for 500 miles and to 12.6 percent in the rates for 1,000 miles.

The 115 percent scale is substantially the same as the joint-line scale proposed by the Wichita Chamber of Commerce for application throughout the Southwest. It is lower than the Kansas City and St. Joseph Chamber of Commerce scale A, which is proposed for application throughout southwestern territory, but under 700 miles it is higher than scale B proposed for application within western trunk-line territory and from Kansas and southern Missouri. As compared with the approved southern and northern Nebraska single-line scales, it will generally produce increases below 500 miles. The 115 percent scale is higher than the proposed scale of the Board of Railroad Commissioners of South Dakota. It is, however, materially lower than the class A rates suggested by defendants, which would produce very material increases in the present rates in both southwestern and western trunk-line territories. The prescription here of rates on horses and mules made 115 percent of the fat-cattle rates prescribed by us would result in reductions in the considered rates on horses and mules from, to, and between points in the Southwest, and in increases in the rates from, to, and between points in the western trunk-line States.

After referring (R. 94) to certain pending applications by the carriers for relief from the requirements of the fourth section of the Interstate Commerce Act, which will be discussed in another

portion of this argument, the Commission made its formal findings as follows (R. 95):

> We find that maximum reasonable rates for the transportation of horses, mules, burros, and asses between points in the territory described at the beginning of this report will be 115 percent of the rates on cattle from and to the same points, prescribed in *Livestock—Western District Rates,* subject to a minimum of 23,000 pounds; that rates in excess thereof are, and for the future will be, unreasonable, and our findings in *Horse and Mule Rates in the Southwest, 1924, Rates on Horses and Mules in the Southwest, Nebraska Livestock Case,* and *South Dakota case* are modified accordingly.
>
> In general the above findings change the former findings in these consolidated cases by substituting for the several scales of rates fixed therein on horses and mules the scale of rates herein found reasonable for general application in the territory covered by these cases. The former findings under section 3 in connection with the interestate rates remain unchanged, and the finding against the Nebraska intrastate rates modifies the former finding made in connection with those rates only with respect to the measure of the scales of rates approved in that case. Our orders requiring compliance with our former findings in these reopened cases respecting the rates on horses and mules will be vacated and set aside. No orders requiring the establishment of rates in conformity

> with the revised findings will now be entered, but defendants will be expected to establish such rates within 90 days after the service of this report. In case this is not done, we will consider the entry of appropriate orders.

More than six months having elapsed, and the carriers not having complied with the above-quoted suggestions, the Commission, on December 11, 1933, entered the orders attacked in this case.

The case of *Livestock—Western District Rates*, 176 I. C. C. 1; 179 I. C. C. 104, and 190 I. C. C. 611, in which were prescribed the cattle rates used by the Commission as a basis for the horse and mule rates, was an investigation instituted upon the Commission's own motion pursuant to the Hoch-Smith resolution (43 Stat. L. 801), wherein the Commission in its report of June 8, 1931 (176 I. C. C. 1) upon a record of more than 15,000 pages of testimony, 4,700 pages of exhibits, and 4,000 pages of briefs, prescribed a scale of reasonable rates, minimum weights and rules for the transportation of edible livestock throughout the western district. Claims of southwestern carriers for higher rates in so-called Texas Differential Territory were denied. As shipments of cattle were greater than of any other variety of edible livestock, the rates fixed for cattle were taken as the basis for the rates prescribed for the other species. (176 I. C. C. 68–69.) Comparing the transportation conditions incident to the various kinds of livestock and previous rate

relationships, the Commission (176 I. C. C. 68–69) made the rates on calves, hogs, sheep, and goats, double-deck, equal to those on cattle; on calves and hogs, single deck, 115 percent, and on sheep and goats, single deck, 125 percent of cattle rates. (See Appendix H to Commission's report, 176 I. C. C. 188.) These rates became effective January 25, 1932. To conform to the expression of this Court in *Atchison, T. & S. F. R. Co.* v. *United States*, 284 U. S. 248, the case was reopened by the Commission January 11, 1932, for further hearing in all respects for the purpose of affording parties opportunity to present evidence of new or changed conditions since the closing of the earlier evidence in May 1928. (190 I. C. C. 611, 613.) In its Report on Further Hearing, the Commission made no material changes in the rates previously prescribed. The edible livestock rates have been in effect since January 1932, and no suit has been brought by any carrier to set aside the order prescribing them. We submit, therefore, that in basing the horse and mule rates involved in the case upon the aforesaid cattle rates, the Commission chose a well-established datum.

We submit that as hereinabove shown, all parties were accorded a full hearing, the evidence was adequate, the findings sufficient, the orders were within the scope of the Commission's powers, and hence this suit to set aside said order was properly dismissed by the statutory court.

II

The courts will not require the Commission to accord specific weight or significance to any particular evidence

In "Point II" of their argument, appellants contend that the orders in question are "vain, invalid and useless" because of the Commission's refusal to "accord weight and legal significance" to certain rate comparisons submitted by appellants. In simple language the charge is that the Commission erroneously weighed certain evidence in that it did not draw from it the conclusions which appellants think it should have drawn. Consequently appellants ask the Court to evaluate the evidence, attribute to it certain conclusions as "undeniably demonstrated" and set aside the Commission's order as contrary to the evidence.

It is well settled that provided there is some substantial evidence in the record to support it, the courts will not set aside a Commission order, even though the court, if weighing the evidence, would have come to a different conclusion. The courts will not weigh the evidence.

In *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 271, this Court said (p. 271):

> * * * The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some

> irregularity in the proceeding or some error in the application of the rules of law. *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *New England Divisions Case*, 261 U. S. 184, 204. No such irregularity or error is shown. In making its determinations the Commission is not hampered by mechanical rules governing the weight or effect of evidence. * * *

Of the numerous cases to the same effect we cite: *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541; *New England Divisions Case*, 261 U. S. 184, 204; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, this Court had under consideration the Commission's use as comparatives of rates which it was contended did not support the conclusion which the Commission reached. The Court said (p. 98):

> The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies, and history of rate making in each section of the country. * * *

In the comparatively early case of *Illinois Central R. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441, 466, this Court said:

> * * * The question submitted to the Commission, as we have said, with tiresome

> repetition perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact and not of law. It seems from the findings, report, and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

In *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 481, appellant objected that the Commission considered an exhibit which, appellant contended, was not representative of existing conditions. But this Court said:

> Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the

Commission's determination, it is not subject to review in the courts. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Assigned Car Cases*, 274 U. S. 564, 580.

In another recent case, *Florida* v. *United States*, 292 U. S. 1, 12, this Court reiterated the above-stated principles with respect to the evidence upon which the Commission had acted.

Apparently recognizing the status of the law, the appellants attempt to disguise their plea that the Court weigh the evidence and correct the alleged mistake of the Commission in its performance of that function. They say the Commission "arbitrarily and capriciously rejected" evidence "which, if given due weight, would have unquestionably compelled" a specific finding desired by them. (App. Brief, p. 50.) The records shows no refusal of the Commission to consider any evidence. Appellants would have the Court deduce that, because the Commission gave more weight to other evidence than it did to that of appellants, it did not consider that introduced by them. Clearly such a deduction cannot be drawn, and appellants cite no authority in support of such theory. The elaborate argument based upon snatches of language from numerous Commission reports would be most appropriate if made, as in large part it probably was, before the Commission, but it can have no place in this or any other court under the law as it now exists. The proven existence of other

horse and mule rates, which were directly related to cattle rates is patently "some substantial evidence", and is sufficient to support the resulting order.

III

The Commission's order is not invalid because it prescribes horse and mule rates by reference to cattle rates previously prescribed.

The fixing of rate levels by reference to an already established scale is equivalent to fixing them by comparison, which has been many times approved by this Court. See *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, 15, 16; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 565; *Western Chemical Co.* v. *United States,* 271 U. S. 268, 271; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665, 666; *Georgia Pub. Ser. Com.* v. *United States,* 283 U. S. 765, 774.

Hence there is nothing inherently wrong in the Commission fixing the horse and mule rates at 115 percent of the established cattle rates.

1. Appellants in their brief contend that because of certain conditions, the existence of which they claim the evidence shows, the use of cattle rates as comparatives in this particular instance was legally improper. They contend that an alleged "dire economic distress" in the edible livestock industry was the "controlling factor" upon which the Commission fixed the edible livestock scale, and that similar depression was entirely absent from the horse and

mule industry. We submit that it is apparent from the Commission's reports in *Livestock-Western District Rates* that while the Commission gave consideration to the depression in the business, it was only one of the factors considered. It is further apparent from the report involved in the instant case that the horse and mule industry had suffered similar depression. In its report the Commission, comparing the edible with nonedible livestock, says (R. 92): "The assertion that cattle, hogs, and sheep are subjected to severer competitive conditions than horses and mules has not been established. It is true that a low level of rates on cattle is necessary to move those animals to the primary markets and that competitive conditions have affected those rates. But the cities which are the primary markets for cattle, sheep and hogs are also the primary markets for horses and mules."

On page 75 of their brief, appellants assert that the cattle rates were determined with "scant regard to transportation considerations". By this they can only mean that the factors which induced the fixing of the cattle rates at the prescribed level were not legally usable and that therefore the rate order was illegal. Appellants' conduct refutes their criticism of the said rates, for although the volume of edible livestock movement is about 25 times that of horses and mules (it is shown that the horse and mule traffic is only three or four percent of the edible livestock traffic), the carriers have

never attempted to have the edible livestock rate order set aside.

The edible livestock rates were and are established rates and no argument as to the manner in which the scale was fixed can deprive it of its value as a basis of comparison. An argument that the edible livestock rates were too low, if it were based on facts, might appeal to the Commission as to the proper evidentiary value it should put upon the rates, but as hereinabove shown, that question is for determination by the Commission.

2. Appellants contend that it was illegal for the Commission to relate horse and mule rates to cattle rates for the further reason that there were differences in the transportation conditions under which the respective commodities move. These transportation conditions are discussed by the Commission in its report and it is pointed out that most of the characteristics apply to all species of domestic livestock. Some differences, however, in the traffic conditions appertaining to the various species are recognized. (See R. 69, 70, 71, 72, 84, 91, 92.)

With respect to these differences and their importance, the Commission came to the conclusion that the only *substantial* transportation disadvantages of horses and mules, as compared with other forms of ordinary livestock, are a higher percentage of loss and damage claims and a higher per car

valuation. Hence, from the standpoint of the carriers, there were some transportation disadvantages incident to the carriage of horses and mules as compared with cattle. The Commission points out, for instance (R. 92) that "The shippers concede that horses and mules are more subject to injury than cattle, but they will be satisfied with a higher level of rates than may apply on cattle." Recognizing that horses and mules should take a higher rate than cattle (as the Commission had previously found with respect to hogs, sheep, and goats), the Commission, being fully advised of all relevant facts, conditions, and circumstances, decided that the difference should be 15 percent. Although presented in divers forms, appellants' plea is, in effect, that this difference should be greater. Whether or not 15 percent is the proper difference, is clearly an administrative question.

3. Appellants object to the relation of the horse and mule rates to cattle rates upon still another ground. This is that the Commission has previously prescribed horse and mule rates which were not so related. We submit that the Commission has the power and is subject to the duty of acting in accord with the evidence in each particular case, regardless of previous actions upon the same or different evidence. The validity of its action is based upon the particular evidence and is not dependent upon consistency with some previous

action. In *Tagg Bros.* v. *United States,* 280 U. S. 420, 445, this Court held that "a rate order is not *res adjudicata.* Every rate order may be superseded by another." In *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663, it was contended that certain conclusions of the Commission were inconsistent with its earlier decisions and that the consequent order was arbitrary in law. This Court, in overruling the contention, said: "To consider * * * whether the findings are consistent with those made by it in other cases is beyond our province." In *Georgia Commission* v. *United States,* 283 U. S. 765, 775, this Court said:

> It is not our province to enquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of it conclusion with those reached in similar cases.

We submit, therefore, that the fact that in other proceedings the Commission has prescribed horse and mule rates without relating them to cattle rates in no way affects the validity of the Commission's action involved in this case.

4. Throughout their brief the appellants complain of the Commission's earlier rulings in other proceedings, and contend that it is incumbent upon the Commission in fixing rates, to make findings reconciling, explaining and justifying its making different rulings in the later case.

Section 14 (1) of the Interstate Commerce Act requires only that the Commission make a report

stating its *conclusions,* together with its decision, order or requirement (in cases not awarding damages). The statutory provision above referred to obviously does not require special findings to be made explaining divergence from previous rulings. Such a requirement would seriously interfere with the effective functioning of the Commission. Such ruling would entail search throughout all the Commission's records in order to detect and distinguish previous findings or orders not in entire harmony with the immediate ruling.

5. Throughout their argument, appellants say the orders attacked are unsupported by "basic findings" (p. 48) or "jurisdictional findings" (p. 91). For instance, on page 91 of their brief, appellants, in questioning the legality of the new rates and the superseding of the old, say "the Commission has made no jurisdictional findings that the rates so prescribed [the earlier rates prescribed or approved in 1924 and 1925] are all that the traffic will bear or that it has not moved * * * freely on such rates." Appellants have evidently misconstrued the meaning of the expression "jurisdictional findings" as used by this Court in consideration of Commission reports and orders. Clearly, the only essential finding with regard to the prior rates was that for the future they would be unreasonably high, and this finding was made. (R. 95.)

In *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 487, this Court pointed out that since

the statute has given the Commission general authority with respect to unreasonable or unduly preferential rates where an award of damages is not included, no formal or precise findings are necessary.

In *Beaumont, etc. Ry. Co.* v. *United States,* 282 U. S. 74, 86, this Court criticized the Commission's report for lack of specific findings, but affirmed the action of the lower court in sustaining the Commission's order.

Appellants' brief (p. 48) cites four cases in support of the proposition that "An order of the Commission unsupported by essential basic findings is void." As stated, the proposition is correct. But the cases cited do not support the contention that any essential, basic finding is lacking from the report accompanying the order here involved.

In *Virginian Ry.* v. *United States,* 272 U. S. 658, cited by appellants, the Court criticized the District Court, and not the Commission, for lack of findings.

In *Florida* v. *United States,* 282 U. S. 194, 215, the Commission was dealing with intrastate rates over which the statute gave it no general authority, and the court held that it was necessary for the Commission to base any order dealing with intrastate rates upon findings showing the existence of the facts under which jurisdiction over intrastate rates is given to the Commission by the statute.

In *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454 (the Power Reverse Gear Case), a

special Act empowered the Commission to require the use by railroads of specific devices on their locomotives only in case they were requisite to remove "unnecessary peril to life or limb." This Court held it necessary for the Commission to base an order requiring carriers to install such devices on a specific finding that the operation of the locomotives without the same would cause such peril. This basic, essential finding lacking, the order was held to be void. We refer without quoting to the last paragraph of the Court's opinion in the above-cited case, which points out the distinction between non-essential, but perhaps desirable, findings and those without which a Commission order is void.

In *United States* v. *Chicago, M. & St. P. R. R. Co.*, 294 U. S. (decided March 4, 1935), this Court sustained the lower court in annulling an order of the Commission which cancelled a rate as unreasonable. This Court held that the Commission's report did not contain the findings of fact necessary to bring the rate involved within the terms of Section 15a (2).

Obviously none of these cases cited by appellants apply in the instant case.

Since the reasonableness of rates can not be proved by categorical answers or figured out as a mathematical problem (*Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 549–50), the only essential finding necessary to the validity of the order attacked in this suit is that the prior rates were unreasonably high and that the rates

prescribed for the future are reasonable. These findings having been made, all legal requirements in this respect have been complied with.

IV

The Commission's order is not invalid because it fails to accord to southwestern territory higher rates than those prevailing in other sections of the country.

We construe appellants' Points VIII to XI, inclusive, to make the contention which we have negatived in the above heading.

1. Their first proposition is that the Commission in fixing the rates attacked was "palpably influenced" by the existence elsewhere than in southwestern territory of subnormal intrastate rates. Appellants do not contend that the Commission in its report has stated that it based the horse and mule rates upon intrastate rates. We submit that the four and one-half pages of appellants' brief (pp. 116–120), devoted to the inference and deduction that the Commission was improperly influenced by intrastate rates and therefore "abdicated its functions", etc., afford nothing tangible.

2. Appellants further assert that the uniform scale of rates attacked is illegal because there exists a more onerous transportation standard in the southwest than in western trunk line territory. They seek to support their assertion by citing the approval by the Commission in certain earlier cases, of a comparatively higher scale of rates in "Texas Differential Territory."

Clearly no railroad can legally claim a vested right to charge a higher rate in a particular artificially prescribed area than elsewhere. The propriety of a relatively higher rated territory is obviously a question for the Commission. The matter was given serious consideration in *Livestock—Western District Rates* under the subhead of "Rate Scale Territories." (176 I. C. C. 60.) Light traffic density in the southwest and peculiar operating conditions were advanced by the southwestern carriers in support of their plea for higher rate levels. After full consideration of this contention (176 I. C. C. 60–67), the Commission decided that for livestock, aside from Rocky Mountain territory, all the western district (including the southwest) should take the same rate level upon edible livestock.

In the case at bar, the question of varying rate levels in different territories was taken up and the Commission's conclusions are found in its report (195 I. C. C., at page 445, R. 91). The ultimate conclusion is that rates on horses and mules should be uniform throughout the territory covered by the consolidated cases. As indicated in the report the Commission record contained a great volume of evidence relevant to the question and this administrative determination of the Commission should not be interferred with by the Court.

V

The Commission's orders are not invalidated by its action or nonaction in connection with fourth section relief

In 1924 and 1925, the Commission granted carriers certain "Fourth Section Relief" (R. 111), whereby they were authorized to maintain rates upon horses and mules in southwestern territory which were contrary to the requirements of Section 4 of the Interstate Commerce Act. (See *infra*, p. 59).

In its 1933 report (R. 94, 95), the Commission refers to these outstanding orders, and suggests that similar relief may be necessary in connection with the new rates prescribed, and also suggests that carriers file applications for such relief as they may require. They later filed such applications (R. 1117–1124), the Commission granted the relief prayed (R. 1090), and appellants are now in enjoyment of the same. Along with the report of July 24, 1933, certain fourth section orders applicable to the superseded rates were vacated, effective February 5, 1934, nearly six months thereafter. (R. 117.) Had the carriers complied with the Commission's suggestion that they voluntarily establish the prescribed rates within 90 days, the old rates would have been cancelled long before the cancellation of the old fourth section order. Since the old rates in fact remained in effect during the pendency of the suit in the lower court, the Commission voluntarily deferred the effective date of

its cancellation from February 5, 1933, until after the dismissal of appellant's suit. Thus the appellants had the benefit of the relief as long as the rates to which it applied were in effect.

1. Notwithstanding the fact that the Commission gave the appellants all needed fourth section relief as to the old rates, the appellants in Point XII of their brief charge that the Commission endeavored to coerce the fulfillment of its expectation by the voluntary establishment of the prescribed rates by the carriers. This they assert was an abuse and misuse of the Commission's powers.

Aside from the obvious fact that the statute gives the Commission the widest possible discretion with respect to granting exceptions from the prohibitions of the fourth section, it is doubtful if a carrier would be heard to contend in court that it had a legal right to violate the terms of a prohibitory statute. On its face, such a statement is a paradox. But it was not necessary for the court to decide the question, because the Commission had refuted all suggestion of a purpose to coerce the carriers, by the fact that it had by successive orders consistently postponed the withdrawal of fourth section relief thereto as long as the old rates were in effect.

2. In Point XV of their brief, appellants contend that the Commission's order is invalid because the Commission required carriers to make application for such fourth section relief as was required in order to comply therewith.

(a) In making general rate orders the Commission has the right and has followed the practice in many instances of requiring carriers to present application for such special consideration or treatment as they desire. See *Business Men's League* v. *A., T. & S. F. Ry. Co.*, 49 I. C. C. 713; *Ex Parte 74, Increased Rates, 1920*, 58 I. C. C. 220, 255; *Reduced Rates, 1922*, 68 I. C. C. 676, 737. This Court has held that the Commission may legally follow said practice. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 625; *Illinois Central R. R. Co.* v. *Pub. Util. Comm.*, 245 U. S. 493, 509. See also *Wisconsin R. R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563, 579; *Georgia Pub. Ser. Comm.* v. *United States*, 283 U. S. 765, 772.

(b) Appellants also contend that absence of fourth section relief in connection with the new rates prescribed would compel carriers to "short haul" themselves in violation of Section 15 (4) of the Interstate Commerce Act. This contention is entirely unjustified.

Section 15 (3) confers authority upon the Commission to compel carriers to establish through routes and joint rates. Paragraph (4) provides, however, that in the ordering of such routes the Commission shall not "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad * * * which lies between the termini of such proposed through route, unless such inclusion of

lines would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

It will be noticed that the orders of the Commission involved in this case do not pretend to require the carriers to establish any through routes. They prescribe only rates, and over such routes as may be established and used by the carriers. These rates are imposed upon the carriers "accordingly as they participate in the transportation", and not otherwise.

(c) But the case has become moot as to all contentions which are based upon absence of fourth section relief provisions from the order prescribing rates.

While we have discussed above the legal aspects of the situation as affected by the fourth section relief, we submit finally, upon this point, that appellants' actions since bringing this suit have completely disposed of the question.

As hereinabove shown, the appellants have applied for, and the Commission has granted, the fourth section relief which has now enabled them to comply fully with the order.

Therefore, this phase of the case is moot. *United States* v. *Anchor Coal Co.*, 279 U. S. 812.[3] *Sprunt & Sons* v. *United States*, 281 U. S. 249.

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[3] Per curiam decision. For full statement of facts see Annual Report of Interstate Commerce Commission, 1929, pages 22–23.

VI

The Commission's denial of appellants' petition for further hearing affords no ground for the setting aside of the order

In Point XIII of their brief, appellants contend that it was "arbitrary and unreasonable" for the Commission to refuse (again) to reopen the reopened proceedings in November 1933, for consideration of certain developments since the closing of the hearings in May 1932. Appellants' petition filed November 8, 1933 (R. 1045–1080) is entitled "Petition of Southwestern Carriers for Reconsideration and Modification of Commission's Findings and Conclusions in its Report on Further Hearing Herein of July 24, 1933, and for Further Hearing—Filed November 8, 1933." It is on its face primarily a motion for reconsideration and modification and only secondarily and conditionally prays a second reopening of the case for further evidence. The petition (and the brief of argument which is made a part of it) reargues the whole case and presses upon the Commission the same propositions already presented by them and rejected by the Commission in its report of July 24, 1933. The petition further states (R. 1046):

> To some extent the foregoing petition is predicated upon facts not of record herein and upon changed conditions that have developed since the last hearing was held herein. *Such additional evidence has been developed in more recent hearings held in*

other complaints or may be verified otherwise from the Commission's records, but if the Commission does not feel at liberty to take note thereof in its consideration of this petition these defendants additionally pray that the Commission reopen these proceedings for further hearing in order that such facts may be incorporated in the record herein.

* * * Thus, it has been developed at hearings recently held by the Commission in other complaints dealing with the interterritorial combination rates on such traffic to points in the Southeast that generally there has been a free and unrestricted movement of the traffic on such rates as far as the Mississippi River crossings, even to the extent of virtually exhausting the stock of these animals that are available for sale in southwestern territory. This aspect of the case will be more fully developed in the ensuing discussion. (Italics ours.)

It will be noted that it is only in case the Commission does not feel at liberty to take note of the alleged changed conditions that appellants desire further hearing. It nowhere appears that the Commission was unwilling to, or did not consider the conditions referred to in the petition, in deciding whether the proceedings should be still further dragged out. But even though the petition be taken as an unconditional prayer that the matter be again reopened and further evidence heard, the Commission was justified in denying it.

The matters upon which the additional evidence was offered were: (1) An alleged increased demand for and enhanced value of horses and mules and (2) the deplorable financial condition of the carriers.

As to improvement in the horse and mule business, appellants referred the Commission to several Department of Agriculture bulletins (Exhibits AH, AI and AJ, R. 1094–1103) and a transcript of testimony given September 26, 1933, by one M. Fies, a Birmingham, Ala., horse and mule dealer, in a proceeding entirely distinct from any of the proceedings consolidated into the *Western Horse and Mule Rate Case* (Ex. AL, R. 1103–1114). The two bulletins first above named express hopes of increased business, and increase in prices and volume of shipments. Mr. Fies' testimony is that he had to pay at Kansas City or East St. Louis about 10 percent more for mules in 1933 than in 1932. (R. 1112–1114.) At the hearing before the court, the appellants offered Exhibit AQ (R. 1116), an unauthoritative compilation purporting to set out in tabular form the prices paid farmers for all kinds of livestock from June 1933 to February 1934. Some increase in price is shown, but, we submit, the change is not such as would as a matter of law require still another reopening of the case. Appellants cite no case, and we know of none, wherein this Court has held that the Commission is under legal compulsion to reopen a proceeding for evi-

dence of a change in the price of, or the traffic in, a commodity which would obviously have only an incidental bearing upon the proper rate level to be applied.

The financial plight of the railroads was even further from being a compulsory ground for reopening the proceeding. The case of *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, had already impressed upon the Commission the necessity for giving consideration to the financial condition of the railroads and in consequence of this decision the Commission had reopened these proceedings and heard considerable further evidence. It had followed the same course in *Livestock-Western District Rates*. Appellants' petition referred to the low ebb of the carriers' finances but presented no figures nor made any offer to show by evidence that their financial condition had changed materially since the hearings had closed. Moreover, it would be absurd to suggest that a reduction of the rate upon a commodity carried in insignificant volume (nonedible livestock shipments are only about three or four percent of those of edible livestock) would materially affect national railroad financial conditions. Appellants' contentions with respect to the reopening of the case before the Commission under *Atchison, T. & S. F. Ry. Co.* v. *United States*, supra, are refuted by the later case of *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494, in which this Court said:

The Commission is not bound to allow existing unreasonable rates to stand solely because revision will in some degree adversely affect carriers suffering from economic depression. The decision in the *Santa Fe* case is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.

VII

The appellants were accorded a fair and unprejudiced hearing by the Commission

In their Point XIV, appellants apparently intend to charge that by reasons of the alleged "set purpose" of the Commission to extend the 115 percent relation into southwestern territory they were denied a fair hearing. The charge is similar to that made in *Ohio* v. *United States,* 292 U. S. 498, 505–6, except that in the case at bar the suspicion of appellants does not arise as it did in the *Ohio Case* from language used in the Commission's report. Here, counsel's agitation arises from the fact that the Commission, by formal order of January 4, 1926, on its own motion, reopened and consolidated for further hearing all the proceedings

dealing with horse and mule rates throughout the western district, in which consolidated proceedings were issued the report and orders involved in this case. Appellants close their eyes to the fact that the Commission's course of procedure was in exact accord with the requirements of the Hoch-Smith Resolution (43 Stat. 801) of January 30, 1925, in which "the Interstate Commerce Commission is authorized and *directed* to make a thorough investigation of the rate structure of common carriers." The validity of the directory provisions of the resolution was not questioned by this Court in *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, nor in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248. Such a general investigation obviously involves many rates which are or have been the subject of other proceedings before the Commission, and in order that the parties to such proceedings may participate and protect their interests, the general practice is to reopen the various proceedings and consolidate them with the general investigation. Such was the procedure followed with regard to horse and mule rates.

Counsel cite, as indicating a "set purpose and fixed design" on the part of the Commission to impose lower horse and mule rates upon the southwestern carriers, certain questions asked by Commission examiners during hearings and assert on page 168 of their brief: *"It is such straws as those that point the way the wind blows."*

To emphasize the complete innocuousness of the examiners' questions, we here quote each colloquy:

> Examiner SIMONS. I am going to ask Mr. Pelton a question which I desire to direct to all of you gentlemen. It is this: Suppose the commission in 17000 prescribes a number of scales, for example, for this territory on livestock,—now, this is a supposition entirely on my part—which will eliminate a great many of these short-haul scales that are in effect in this territory. Do you think it would be proper to relate the horse and mule rate to the livestock rates, say, beef cattle rates, making them a certain percentage over, as the Commission has done in several of these cases.
>
> I just want to get the views of you gentlemen who may testify as to whether you think that will cure the situation or not. There is, as you know, a scale which has been prescribed which was about 120 percent in the Dimmitt-Caudle-Smith case, and in the South Dakota and Nebraska cases they prescribed 115 percent of the livestock rates.
>
> The WITNESS. I could conceive of no nearer relationship from the transportation standpoint as between edible livestock and horses and mules. I would not like to say that 120 percent would be reasonable but a relationship not to exceed 115 percent is desirable, based upon transportation conditions. I believe 15 percent would cover all

the difference in the transportation features on horses and mules and other livestock. (R. 614.)

By Exam. CARNEY:

Q. There was some testimony here by a previous witness, as I recollect it, that they were satisfied to have the rates on horses and mules adjusted on the basis of the rates found by the Commission in Docket 17000, Part 9.

A. Yes, sir.

Q. Assume that the 17000, Part 9, eliminates all the discrimination that's been alleged in these complaints by reason of the adjustment of the cattle rates. Have you any fault to find with a proposal of that kind, that the rates on horses and mules be made 15 percent over the cattle rates?

A. No, sir. (R. 654.)

It should be noted that counsel for appellants who were present when the above questions were asked entered no objection to the inquiries or to the answers.

This point, and others of similar triviality, were raised in the lower court and pressed in the same manner as that which has been adopted by counsel in this Court. The lower court had no difficulty in seeing the Commission's actions in their true light. (See paragraph 3 of opinion of the District Court; R. 903.) Appellants have not demonstrated that the lower court was in error.

CONCLUSION

For the reasons above set out we submit that the decree of the District Court should be affirmed.

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APRIL, 1935.

APPENDIX

For the convenience of the Court we here insert some sections of the Interstate Commerce Act to which the Court may wish to refer in considering this case.

> SECTION 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *
>
> SECTION 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.
>
> SECTION 4 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route

in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; * * *

SECTION 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own

initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transportation of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt

the classification and shall conform to and observe the regulation or practice so prescribed.

SECTION 15 (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fare, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; * * *

SECTION 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: * * *

Section 15a (2) (Sec. 205, Emergency Transportation Act, 1933). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consid-

eration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

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